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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALEXANDER SMIRNOV,

Defendant.

No. CR 2:24-cr-00091-ODW

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL
AND FOR ISSUANCE OF SUBPOENAS;
MEMORANDUM IN SUPPORT;
DECLARATION OF COUNSEL

Hearing Date: November 25, 2024
Hearing Time: TBD
Location: Courtroom of the Hon.
Otis D. Wright II

Plaintiff, the United States of America, by and through its counsel of record, hereby submits this Opposition to Defendant's Motion to Compel and for Issuance of Subpoenas (the "Motion to Compel"), filed on November 18, 2024. *See* ECF No. 183 (Defendant's

1 Notice of Manual Filing). The Motion to Compel contains classified information but, for
2 the reasons explained below, the Government is responding in an unclassified filing.

3 The Motion to Compel, in which Defendant seeks to “compel attendance of . . .
4 witnesses and issuance of . . . subpoenas,” should be denied because it is premature. The
5 Motion relates to requests sent by defense counsel to Government counsel in this case.
6 Although counsel styled the requests as “*Touhy* demands,” Defendant, as of this filing, has
7 not served a proper demand sufficient to trigger the procedures under the Department of
8 Justice’s regulations governing requests for official information. *See* 28 C.F.R. §16.21 *et*
9 *seq.* (*i.e.*, the Department’s *Touhy* regulations). Moreover, as defense counsel
10 acknowledges, an attorney with the Justice Department’s Civil Division has already
11 informed defense counsel that any response to those demands will depend, at least in part,
12 on the Court’s evidentiary rulings (and hearings on those evidentiary issues are scheduled
13 for this Monday, November 25, 2024). *See* 28 C.F.R. § 16.26(a). Because the Justice
14 Department has yet to render a decision on Defendant’s request for official information,
15 Defendant’s motion is premature.

16 This Opposition is based upon the attached memorandum of points and authorities,
17 the attached declaration of counsel, the filings and records in this case, and any further
18 argument as the Court may deem necessary.

19 Dated: November 21, 2024

Respectfully submitted,

20 DAVID C. WEISS
21 Special Counsel

22
23 /s/

24 LEO J. WISE
25 Principal Senior Assistant Special Counsel

26 DEREK E. HINES
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United States Department of Justice

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND

On October 24, 2024, defense counsel emailed Government counsel a “*Touhy* demand” for FBI information (the “FBI *Touhy* Demand”). *See* Decl. of Christopher M. Rigali (“Rigali Decl.”), ¶ 2. In addition to Defendant’s FBI handling agent (the “FBI Handler”), the FBI *Touhy* Demand seeks testimony from 31 other FBI agents or employees. Demand, at 1–7. The FBI *Touhy* Demand contains a “discussion” section, which explains: “It is anticipated that these witnesses will, among other items of evidence value, provide testimony illustrating that . . . Mr. Smirnov performed numerous specific acts demonstrating honesty and trustworthiness during his many years of service to the United States.” *Id.*, at 8. It continues, in part: “In this case, Rule 405(b) both compels the evidence detailing the numerous ‘specific instances’ of good ‘conduct’ that Mr. Smirnov rendered to the United States during his years of service. These acts are known only to the witnesses listed above.” *Id.* Elsewhere in the FBI *Touhy* Demand, Defendant explains that he seeks witness testimony which he believes would demonstrate that the FBI Handler was deficient in his recordkeeping. *Id.*, at 2–3. Toward the end of the letter, defense counsel states the following: “[W]e respectfully request that you please confirm whether or not the FBI will object to the foregoing agents’ testifying at trial. . . . Trial is set to begin December 3, 2024.” *Id.*, at 10.

In his cover email, defense counsel noted that they had not served the FBI with the FBI *Touhy* Demand and asked whether Government counsel would serve the FBI on their behalf. Rigali Decl. ¶ 2. The following day, October 25, Government counsel responded that it was “in the process of determining whether we are able to accept service of the subpoenas” Rigali Decl. ¶ 3.

On November 1, the Government filed several motions *in limine*, which are set to be heard on November 25, 2024. ECF Nos. 150–54. Two of those motions are relevant here. First, the Government moved *in limine* to preclude Defendant from seeking to introduce at trial “specific instances of conduct” evidence. ECF No. 152. As that motion

1 explained, Rule 405(b) permits “specific instances of conduct” evidence only in cases
2 where “a person’s character or character trait is an essential element of a charge, claim, or
3 defense,” which is not the case here. *Id.* Second, the Government moved *in limine* to
4 exclude “certain evidence pertaining to the conduct of the FBI Handling Agent who
5 worked with the defendant . . . , including administrative reports that contain minor notes
6 about the sufficiency of the Handling Agent’s documentation.” ECF No. 151, at 1. In
7 short, the Government in this case has moved to exclude, under various bases, the evidence
8 that is the subject of the FBI *Touhy* Demand. As noted just above, these motions are set
9 for a hearing on November 25, 2024.

10 In light of the FBI *Touhy* Demand, Government counsel sought out and obtained a
11 point of contact in the Federal Programs Branch of the Justice Department’s Civil
12 Division. Rigali Decl. ¶ 4. Federal Programs Branch attorneys typically handle *Touhy*
13 requests served on the Justice Department and components thereof, including the FBI. *Id.*
14 ¶ 4.¹

15 On November 14, 2024, an attorney with the Justice Department’s Civil Division
16 emailed defense counsel explaining that counsel’s letter was insufficient to trigger the
17 Department of Justice’s *Touhy* regulations, which govern requests for official information.
18 Rigali Decl. ¶ 5. Notwithstanding that Defendant’s request did not comply with that
19 requirement, the Civil Division attorney further explained that because any response
20 would depend, in part, on the Court’s ruling on the currently pending motions *in limine*,
21 Defendant’s non-compliance with procedural requirements had not yet caused any delay.
22 *Id.* After defense counsel inquired whether the Department would authorize the requested
23 testimony if the motion to exclude were denied, Civil Division counsel further explained
24 that she could not address what position the agency would take under those circumstances
25 because Defendant’s request was being evaluated. *Id.* ¶ 6.

26
27 ¹ While Defendant asserts that an email from Civil Division counsel regarding this matter implies
28 that the FBI has accepted service of the subpoenas, that assertion is without basis, especially because, as
discussed below, the content of counsel’s email indicated that proper service remained necessary.

1 Since that time, defense counsel and Civil Division counsel have continued to
2 correspond concerning defense counsel's questions regarding effecting service on the FBI.
3 Rigali Decl. ¶ 7.

4 **II. THE INSTANT MOTION**

5 On November 19, 2024, the Government received, via the Classified Information
6 Security Officer, the Motion to Compel, which is properly marked as classified. *See* ECF
7 No. 183 (Defendant's Notice of Manual Filing referencing "CIPA documents"). In the
8 Motion to Compel, Defendant asks the Court to hear and decide the Motion to Compel at
9 hearings set to occur on November 25.

10 The Government does not oppose a hearing on the Motion to Compel on November
11 25 (although the Motion certainly can be decided on the papers). And while the Motion
12 to Compel discusses certain properly classified information, the Government submits that
13 the Court can and should hear any dispute over the FBI *Touhy* Demand on the public
14 record, as that dispute does not implicate classified information.² Given that the FBI
15 *Touhy* Demand dispute does not implicate classified information, the Government submits
16 this response in opposition to the Motion to Compel on the public docket.

17 **III. ARGUMENT**

18 The Justice Department has yet to take final action on the FBI *Touhy* Demand.
19 Indeed, even after Defendant effects service of a proper demand on the FBI—a
20 prerequisite for the Department's consideration of whether to authorize the requested
21 testimony—the Justice Department is required to consider "[w]hether such disclosure is
22 appropriate under the rules of procedure governing the case or matter in which the demand
23 arose." 28 C.F.R. § 16.26(a)(1). The Justice Department cannot properly do that here
24 when the evidence sought by Defendant is the subject of a pending motion before this
25 Court. Accordingly, Defendant's Motion to Compel is at best premature because the
26 Justice Department has not rendered a decision on Defendant's unperfected *Touhy* request.

27 ² The Government notes that it may be appropriate for the Court to hear part of the Motion to
28 Compel in a sealed, *in camera* proceeding.

1 **A. *Touhy* Regulations**

2 The Justice Department “has promulgated regulations, authorized by 5 U.S.C.
3 § 301, setting forth the procedures it follows in response to demands for production or
4 disclosure of information for state and federal court proceedings from the Department of
5 Justice and its employees.” *Kwan Fai Mak v. F.B.I.*, 252 F.3d 1089, 1092 (9th Cir. 2001
6 (quotation omitted). Those regulations govern “the production or disclosure of any
7 information acquired by any person while such person was an employee of the Department
8 as a part of the performance of that person’s official duties or because of that person’s
9 official status.” 28 C.F.R. § 16.21(a). Those regulations also, *inter alia*, set forth the
10 factors that Department should consider “[i]n deciding whether to make disclosures
11 pursuant to a demand,” 28 C.F.R. § 16.26, such as “[w]hether such disclosure is
12 appropriate under the rules of procedure governing the case or matter in which the demand
13 arose,” *id.* § 16.26(a). “Among the demands in response to which disclosure will not be
14 made by any Department official are,” *inter alia*, those demands with respect to which
15 “[d]isclosure would reveal classified information, unless appropriately declassified by the
16 originating agency” and those with respect to which “[d]isclosure would reveal
17 investigatory records compiled for law enforcement purposes, and would interfere with
18 enforcement proceedings or disclose investigative techniques and procedures the
19 effectiveness of which would thereby be impaired.” *Id.* § 16.26(b).

20 Consideration by the Department under this regulatory framework depends on the
21 Department’s receipt of a proper demand. The Ninth Circuit has recognized that “the
22 regulations are quite specific,” defining a “demand” as a “subpoena, order, or other
23 demand . . . of a court or other authority.” *Kwan Fai Mak*, 252 F.3d at 1092 n. 4 (quoting
24 28 C.F.R. § 16.21(a)(2)); *see also* 28 C.F.R. § 16.23(c) (specifying requirements for a
25 demand for oral testimony in a case in which the United States is a party).

B. Premature Nature of the Motion to Compel

As a preliminary matter, as of this filing, Defendant has not served subpoenas demanding testimony on the appropriate personnel (the FBI), and therefore has not triggered the above-discussed regulatory framework for assessing whether to authorize disclosure. *See Kwan Fai Mak*, 252 F.3d at 1093 (“In the absence of an actual demand (in the form of, e.g., a state court subpoena) that the federal government disclose [the information sought], the necessary steps have not been taken under the *Touhy* regulations to require the Department of Justice to determine whether to release the information sought”). But, even if Defendant had done so, his motion to compel still would be premature.

In this case, Defendant seeks testimony from 32 FBI agents and employees. Defendant’s FBI *Touhy* Demand makes it abundantly clear that he seeks this evidence (in the form of testimony) to (1) elicit “specific instances of conduct” to prove his alleged character for truthfulness or honesty; and (2) to impeach a Government witness—the FBI Handler—with evidence that the FBI Handler was allegedly deficient in his recordkeeping. Defendant concludes that that he “is entitled to have these [FBI] witnesses testify as the FBI was involved in the investigation of Mr. Smirnov, and their testimony will be exculpatory.” Motion to Compel, at 5.

As previewed earlier, the Justice Department’s *Touhy* regulations require consideration of whether “disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose.” 28 C.F.R. § 16.26(a)(1). In this federal criminal case, the “rule of procedure governing the case” include, among other things, the Federal Rules of Evidence. As discussed, the Government has moved *in limine* to exclude (1) “specific instances of conduct” evidence aimed at proving Defendant’s alleged character for truthfulness and honesty, *see* ECF No. 152; and (2) evidence of the “FBI Handling Agent’s alleged mistakes,” including purported deficiencies in recordkeeping, *see* ECF No. 151. The Court is set to hold a hearing on those matters on November 25,

1 2024. Until the Court issues a ruling on the admissibility of the information sought by
2 Defendant in the FBI *Touhy* Demand, the Justice Department cannot appropriately analyze
3 whether disclosure of internal FBI information is warranted. Because that is the case,
4 which has been explained to defense counsel, there has been no final agency determination
5 as to Defendant's request.

6 This Court should conclude, as other courts have, that a defendant's motion to
7 compel is premature unless there is a final agency determination on the *Touhy* demand.
8 The United States District Court for the Eastern District of New York set forth the
9 appropriate analysis in a case where a litigant moved a federal government agency to
10 comply with a subpoena:

11 Based on the record before the Court, OSHA has not yet issued a final
12 determination in response to Plaintiff's Subpoena. Rather, OSHA has
13 repeatedly explained to Manzo that it is declining his request at this time, but
14 that the request will be reconsidered once Plaintiff satisfies the DOL *Touhy*
15 Regulations. . . . OSHA's statements that it is "not refusing at this time to
16 produce" and that it will "promptly consider" the discovery demand upon
17 receipt of the relevant information signify that the agency has not yet finalized
18 its decision-making process, undermining a finding of a final agency action.
19 *See Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S. Ct. 2767, 2773
20 (1992) ("The core question is whether the agency has completed its
21 decisionmaking process, and whether the result of that process is one that will
22 directly affect the parties.'). As such, **without a final agency action,**
23 **Plaintiff's motion is premature.** *See Meisel [v. FBI]*, 204 F. Supp. 2d [684]
24 at 685–90 (explaining that even where the moving party has complied with
25 the applicable *Touhy* regulations, the motion to compel will be denied where
26 the opposing agency's conduct is not final).

Without a final determination by the agency, there is nothing here for the Court to review. Accordingly, Plaintiff's Motion to Compel is again denied

Manzo v. Stanley Black & Decker, Inc., No. 13-CV-3963, 2017 WL 1194651, at *9 (E.D.N.Y. 2017) (emphasis added).

Similarly, in *In re Countrywide Financial Corporation Securities Litigation*, another Judge of this Court denied a motion to compel two federal agencies to produce documents because the requestors had failed to exhaust their administrative remedies. No. 07-CV-5295, 2009 WL 5125089, at *2 (C.D. Cal. Dec. 28, 2009). Reasoning that “[p]laintiffs must first exhaust all administrative procedures” and request the documents from the agencies “pursuant to federal regulations,” the Court held: “*If* the [agencies] do not authorize disclosure of the information that is relevant to this litigation, *then* the parties can seek the appropriate relief from this Court.” *Id.* at *2 (emphases added). Here, while Defendant has indicated an intention to perfect his demand, he neither has done so nor received the Department’s determination.

IV. CONCLUSION

For the reasons set forth above, the Court should deny Defendant's Motion to Compel.